

BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Petition for Interim
Suspension Order Against:

JAMES ANDREW STEWART,

Original Pharmacy Technician Registration
Number TCH 83148

Respondent.

Case No. 5722

OAH No. 2016030267

ORDER ON PETITION FOR INTERIM SUSPENSION

This petition was heard before Administrative Law Judge (ALJ) David Rosenman, Office of Administrative Hearings, on April 15, 2016, in Los Angeles, California. Armando Zambrano, Deputy Attorney General, represented Virginia K. Herold, Executive Director (petitioner), Board of Pharmacy. James Andrew Stewart (respondent) was not present or represented at the hearing.

At the hearing, the memorandum of points and authorities supporting the petition was amended (page 5, line 17) to correct a mistyped reference from section 393 to section 494. The matter was submitted for decision on April 15, 2016.

Petitioner contends that an interim suspension order should issue based on respondent's assault of a pharmacy customer and his conviction for battery. For the reasons set forth in more detail below, the petition is granted and an interim suspension order will be issued.

FACTUAL FINDINGS

1. The Petition for Interim Suspension Order (Petition) was filed on March 4, 2016. Petitioner filed the Petition in her official capacity as Executive Director of the Board of Pharmacy (Board). (The Petition is in evidence as exhibit 1; each of the seven exhibits (with sub-exhibits) attached to the Petition are referred to as "exhibit __ to the Petition.") The Petition was served by mail on March 4, 2016, to respondent at his address of record with the Board.

2. On May 6, 2008, the Board issued Original Pharmacy Technician registration number TCH 83148 to respondent. The Original Pharmacy Technician registration will expire on June 30, 2017, unless renewed.

3. The Petition alleges respondent violated the Business and Professions Code¹ based on his assault of a pharmacy customer and his conviction for battery. On April 15, 2016, pursuant to Code section 494, subdivision (d), a noticed hearing on the Petition was held, declarations and other documents were received in evidence, argument was made and the matter was submitted for decision.

4. On December 13, 2015, a customer came to the pharmacy counter at the Walmart store in Palmdale where respondent was employed as a registered pharmacy technician. There was a discrepancy between the amount of insulin listed in the customer's prescription and the amount of insulin in the box containing the filled prescription. Respondent sought input from the pharmacy supervisor, who was working on another customer's prescription. Respondent told the customer it would take a few moments. An argument ensued. Witnesses described the customer and respondent as being upset, and that the customer was not rude. Respondent removed his Walmart smock, came around from behind the pharmacy counter, and hit the customer several times in the face with his fist. The customer had bruises visible to witnesses and the police. At his manager's request, respondent wrote a statement the same day (exhibit A to exhibit 5 to the Petition) indicating that he tried to explain the discrepancy to the customer, that it would take a few minutes, and the customer argued and got loud and rude, pointing a finger and disrespecting respondent. Respondent admitted walking around the counter and punching the customer three or four times.

5. On February 17, 2016, in *People v. James Andrew Stewart*, Superior Court of California, Los Angeles County, case number 6AN00720, respondent pled nolo contendere and was convicted of violating Penal Code section 242-243(A), battery. Respondent was sentenced to summary probation for 36 months.

6. The Declaration of Katherine Sill, Pharm.D. (exhibit 6 to the Petition), establishes that the crime of battery and respondent's underlying acts are substantially related to the qualifications, functions, and duties of the holder of a registration as a pharmacy technician, and that permitting respondent to continue operating under his registration would endanger the public health, safety or welfare.

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¹ All statutory references are to the Business and Professions Code, except where noted.

LEGAL CONCLUSIONS

1. Under Code section 494, an interim order of suspension may be issued if it is established that the licensee or registrant has violated the Code, and that permitting the licensee to continue operating under his license would endanger the public health, safety or welfare. The order may suspend a licensee from practicing or may impose license restrictions. The standard of proof for the issuance of an interim suspension order is preponderance of the evidence. The petition may be served by mail on the registrant's address of record with the licensing agency, under Code section 494, subdivisions (b) and (c).

An interim suspension order is of limited duration, remaining in effect only as long as the licensing board follows strict requirements to expeditiously afford the licensee a full hearing on the charges. Following issuance of the order, the Board must file an accusation within 15 days, if an Accusation has not already been filed (Code section 494, subdivisions (f)). If the licensee files a notice of defense, a hearing must be held within 30 days and a decision issued within 30 days of the submission of the matter.

2. Code section 4301 states generally that the Board shall take action against a licensee who is guilty of unprofessional conduct. Under subdivision (l), it is unprofessional conduct for a licensee to be convicted of a "crime substantially related to the qualifications, functions, and duties of a licensee under this chapter. . . . [T]he record of conviction shall be conclusive evidence only of the fact that the conviction occurred. The board may inquire into the circumstances surrounding the commission of the crime, in order to fix the degree of discipline or, in the case of a conviction not involving controlled substances or dangerous drugs, to determine if the conviction is of an offense substantially related to the qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this provision. . . ."

3. Under California Code of Regulations, title 16, section 1770, a crime "shall be considered substantially related to the qualifications, functions or duties of a licensee or registrant if to a substantial degree it evidences present or potential unfitness of a licensee or registrant to perform the functions authorized by his license or registration in a manner consistent with the public health, safety, or welfare."

4. Public protection is the primary purpose for the Board, under Code section 4001.1.

5. Respondent's conviction is for a crime substantially related to the qualifications, functions, and duties of the holder of a registration as a pharmacy technician. Respondent's actions while functioning under his registration were not consistent with the public health, safety, or welfare.

6. Cause exists to issue an interim suspension of respondent's registration as a pharmacy technician for unprofessional conduct under Code section 4301, subdivision (1), for conviction of a crime substantially related to the qualifications, functions or duties of a registrant, as set forth in Factual Findings 4 and 5, and Legal Conclusions 2-5.

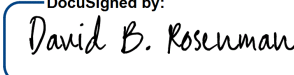
7. Petitioner established that permitting respondent to continue operating under his registration would endanger the public health, safety or welfare.

8. Cause exists for issuance of an interim order against respondent under Code section 494. The petition for an interim suspension order will be granted.

ORDER

The petition for an interim suspension order pursuant to Business and Professions Code section 494 against Original Pharmacy Technician registration number TCH 83148 issued to respondent James Andrew Stewart is granted, and the registration is suspended. Respondent James Andrew Stewart shall not engage in any activity requiring registration as a pharmacy technician pending the filing of an accusation and issuance of a decision on the accusation.

DATED: April 15, 2016

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DAVID ROSENMAN
Administrative Law Judge
Office of Administrative Hearings